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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

1971 - October Term
No.

GEORGE A. TSAKALOTOS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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The petitioner, George A. Tsakalotos, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

the Second Circuit dated and entered in this proceeding on January 19, 1972.

OPINION BELOW

No opinion was rendered by the United States Court of Appeals for the Second Circuit, nor by the United States District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was dated and entered on January 19, 1972 and this petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecution must prove the materiality of a false statement before there can be a conviction under 18

U.S.C. Section 1001?

2. Whether the false statement of the petitioner upon a United States Coast Guard application for renewal of a master's license, made when petitioner was president of a steamship company and within three years of the time petitioner had served aboard a vessel as master, was punishable under 18 U.S.C. Section 1001?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, Section 1001:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to

> contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

The basis of the jursidiction of the trial court below was the indictment of petitioner under 18 U.S.C. Section 1001.

The evidence introduced by the respondent Government at trial established that in November, 1964 petitioner George A. Tsakalotos filed an application for renewal of his master's license with the United States Coast Guard. Upon the application, petitioner stated that he had served aboard the vessel THEONYMPHOS TINOU as master on international waters from August 25, 1964 to October 26, 1964.

Subsequently, and as a part of said application, on December 18, 1964, petitioner filed with the Coast Guard a letter from Anargyros Skinitis (hereafter "the Skinitis letter"), Marine Superintendent of the Tsakalotos Navigation Corp. (the company which petitioner headed as president), stating that petitioner served the company in the position of port captain and, as such, was intimately involved in the operation of vessels; the letter confirmed petitioner's service aboard the THEONYMPHOS TINOU, a Lebanese flag vessel, during the aforesaid months. On the same date he filed the Skinitis letter, petitioner passed an open examination administered by the Coast Guard and, thereupon, his master's

license was renewed. The respondent established and it was not disputed by petitioner that petitioner's statement on the application concerning his sea service aboard the vessel was false for he was ashore in Greece during the time he had stated he was serving as master aboard the vessel at sea.

A Coast Guard officer testified for the respondent that in order to renew a master's license via the open book examination route, the applicant must demonstrate to the Coast Guard that he had served aboard a vessel sometime during the three years preceding the application or, alternatively, establish that he was employed in a field closely related to the seamen's profession, e.g., an

admiralty attorney or a naval architect, or, indeed, a steamship company president as the petitioner, in fact, was.

To establish that petitioner made his false statement knowingly and wilfully, over the objection of defense counsel, respondent introduced evidence which, the respondent contended, demonstrated that the petitioner in 1959 had made a false statement on an earlier application to renew his master's license and, still earlier, in 1954 petitioner made a false statement on his original application for a master's license.

Petitioner readily conceded at trial that he had made a false statement on the application he filed with the Coast Guard in 1964. However,

petitioner contended all along that he did not make the false statement knowingly and wilfully - there was an honest and explainable mistake.

Petitioner testified that for many years preceding the 1964 application for renewal, he had been actively involved in the maritime profession as a midshipman, merchant marine officer, salesman of nautical supplies, marine surveyor and president of a steamship company. This evidence was corroborated by the testimony of both prosecution and defense witnesses.

Petitioner further testified that at the time he was about to file the application for renewal, he asked his company's marine superintendent, Skinitis, to furnish him with a memorandum

setting forth petitioner's sea service; subsequently, he asked Skinitis for a letter which outlined his sea service; Skinitis fulfilled these requests, but erroneously stated the dates of the petitioner's sea service. The petitioner, believing same to be correct, used the Skinitis memorandum of sea service when he filled out the application and he later submitted the Skinitis letter to the Coast Guard. The petitioner explained how the incorrect statement was made on the application: He served aboard the S.S. THEONYMPHOS TINOU as supervising master when the vessel was undergoing repairs in New York and New Jersey waters during July through October, 1962; the vessel was under foreign registry, thus these waters were international. Petitioner also met the vessel in Rotterdam in September, 1964, where he again served as supervising

master. In the erroneous memorandum and letter, Skinitis informed him that he had served aboard the vessel from August to October, 1964, almost the same months, but a different year. (The correct dates being July through October, 1962.)

Through the testimony of defense witnesses and documents, the petitioner introduced evidence to establish that he had not filed a false statement on his 1954 and 1959 applications.

Two Coast Guard officers with several years of experience in the licensing of merchant marine personnel testified, one for the prosecution and the other for the defense, that had the petitioner merely presented the Skinitis letter stating that he was employed in the maritime profession, without setting forth in this letter or

THEONYMPHOS TINOU, the petitioner would have been permitted to renew his license on the same basis as if he did have this experience at sea. They testified that since his employment is a position closely related to operation of vessels, the license would have been renewed without the erroneous sea service time.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SEVEN OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 18 U.S.C. SECTION 1001.

The petitioner's false statement on the application for renewal of his master's license, that he had sailed as master of the THEONYMPHOS TINOU for a period of two months in 1964 when in fact he had not done so, was completely immaterial, for the Coast Guard would have renewed his license even if he had not

made this statement. Upon the renewal of a master's license, if the applicant is to take an open book examination, he must demonstrate to the Coast Guard that he had some type of service on a vessel during the three year period preceding the filing of the application or present evidence of employment in a position closely related to the operation of vessels within the same three year period. For many years preceding the filing of the application for renewal, the petitioner had been actively involved in the maritime profession, culminating with his position as president of a steamship company. Thus, the petitioner was certainly qualified to renew his license by virtue of his employment; ergo, the incorrect

statement on the application pertaining to his sailing experience was immaterial to the renewal of his license.

While it is true that the trial court, which sat without a jury, stated at the close of the respondent's case that it felt that petitioner's statement was material, this was, of course, before it heard petitioner's evidence which was introduced to establish the statement's immateriality. At the close of the entire case, the trial court did not comment on the record whether it felt the statement was material.

There is nothing in the history of Section 1001 which indicates whether the Congress intended to punish as criminal false statements which are immaterial. Of

the eight Courts of Appeals which have decided this issue, only the Second Circuit has held that in a prosecution under 18 U.S.C. Section 1001, the Government is not obliged to prove the materiality of the false statement in order to obtain a conviction [United States v. Silver, 235 F.2d 375 (2nd Cir. 1956), cert. denied, 352 U.S. 880 (1956); United States v. Rinaldi, 393 F.2d 97 (2nd Cir. 1968), cert. denied, 393 U.S. 913 (1968); United States v. Aadal, 368 F.2d 962 (2nd Cir. 1966), cert. denied, 386 U.S. 970 (1967); United States v. Mahler, 363 F.2d 673 (2nd Cir. 1966); United States v. Marchisio, 344 F.2d 653 (2nd Cir. 1965); United States v. McCue, 301 F.2d 452 (2nd Cir. 1962), cert. denied,

370 U.S. 939 (1962) and United States v. Sorkin, 275 F.2d 330 (2nd Cir. 1960), cert. denied, 362 U.S. 989 (1960)].[1]

The view of the Court of Appeals for the District of Columbia Circuit in Freidus v. United States, 223 F.2d 598, 601-2 (1955), which is the majority view, has been repeated in several opinions of the other Circuits:

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1 Curiously enough, the Court of Appeals for the Second Circuit has recognized that it is endemic to a prosecution for perjury, a crime substantially identical in all respects to the crime of making a false statement, that the statement alleged to be perjurious must be material in order to sustain a conviction. United States v. Marchisio, 344 F.2d 653, 665 (2nd Cir. 1965). Certainly, there is no compelling, logical reason for that court to require proof of materiality for perjury and not require it for the crime of making a false statement.

"'One portion of §1001 refers to willfully and knowingly falsifying, concealing or covering up '"'a material fact.'"' On the other hand, the part here involved, without expressly mentioning materiality, prohibits '"' any false, fictitious or fraudulent statements or representations. '"' We think, however, that this highly penal statute must be construed as requiring a material falsification. The legislative purpose strongly implies that only material false statements were contemplated, i.e., statements that could affect or influence the exercise of a governmental function. That purpose, as expressed by the Supreme Court in United States v. Gilliland [312 U.S. 86, 93 (1941)], was '"'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. '"' No perversion of a governmental function could possibly result from a false statement that was incapable of affecting or influencing such function. And the greater weight of authority in the federal courts supports the view that

> materiality is an essential element of the offense described by §1001.'" Weinstock v. United States, 231 F.2d 699, 702 (D.C. Cir. 1956).

In addition to the District of Columbia Circuit, six other Circuits have held that the Government must prove materiality under Section 1001. In United States v. Zambito, 315 F.2d 266, 268 (4th Cir. 1963), cert. denied, 373 U.S. 924 (1963), the defendant was convicted inter alia, of the crime of willfully misrepresenting a material fact on his wagering tax return. The Fourth Circuit, in affirming the conviction, held that the statute "proscribes only those falsifications which pertain to material facts"; the court concluded that the defendant's false statement was material.

In Rolland v. United States, 200 F.2d 678, 680 (5th Cir. 1953), cert. denied, 345 U.S. 964 (1953), the Fifth Circuit, in reversing a conviction for having made false statements in matters within the jurisdiction of the Wage, Hour and Public Contracts Division of the United States Department of Labor, held that the indictment was defective for its failure to charge that the complained of statement was material. The court also held in United States v. Moore, 185 F.2d 92 (1950), that materiality was an element to be established for the defendant to be convicted under the statute. Cf. United States v. Satterfield, 411 F.2d 602 (1969).

In Hupman v. United States, 219 F.2d 243 (6th Cir. 1955), cert. denied,

349 U.S. 953 (1955), the Sixth Circuit, upon reviewing an indictment which charged the defendant with knowingly filing a false affidavit with the National Labor Relations Board, held that the indictment was sufficient in that it did charge that the false statement was material.

The Eighth Circuit, in Brethauer v. United States, 333 F.2d 302, 306 (1964), held, "To be sure, an essential element of the offense of making a false, fictitious or fraudulent statement proscribed by 18 U.S.C. §1001, is that such statement relates to a 'material fact.'" Blake v. United States, 323 F.2d 245 (1963); Ebeling v. United States, 248 F.2d 429 (1957), cert. denied,

355 U.S. 907 (1957).

The Ninth Circuit, in several decisions, has held that the prosecution must establish that the false statement was material. United States v. East, 416 F.2d 351 (1969); Tzantarmas v. United States, 402 F.2d 163 (1968), cert. denied, 394 U.S. 966 (1969); Paritem Singh Poonian v. United States, 294 F.2d 74 (1961); Brandow v. United States, 268 F.2d 559 (1959); Cohen v. United States, 201 F.2d 386 (1953), cert. denied, 345 U.S. 951 (1953); Todorow v. United States, 173 F.2d 439 (1949); cert. denied, 337 U.S. 925 (1949); cf. Neely v. United States, 300 F.2d 67 (1962), cert. denied, 369 U.S. 864 (1962); Dear Wing Jung v. United States, 312 F:2d 73 (1962); United States v. Rice Growers Ass'n of California, 110 F.Supp. 667 (N.D. Calif.

1953).

The view of the Tenth Circuit, set forth in Gonzales v. United States, 286 F.2d 118, 120 (1960), cert. denied, 365 U.S. 878 (1961), is, "We are of the opinion that the better reasoned rule, supported by the weight of authority, is that Congress intended that materiality should be an essential element of the offenses defined in Section 1001." Poulos v. United States, 387 F.2d 4 (1968); Sells v. United States, 262 F.2d 815 (1958), cert. denied, 360 U.S. 913 (1959).

Thus, if the petitioner had filed his application in the jurisdiction of the seven Circuits which do not agree with the Second Circuit, he would not have been convicted under the statute.

This conflict between the

Second Circuit and the other Circuits justifies the granting of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

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GEORGE A. TSAKALOTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
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Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Southern District of New York, petitioner was convicted of having made a false statement to the United States Coast Guard in an application for Renewal of a License as Master of Steam and Motor Vessels, in violation of 18 U.S.C. 1001. On August 31, 1971, petitioner was fined $4,000, which he subsequently paid. The court of appeals affirmed without opinion.

Coast Guard Regulations, as printed on the application form for renewal of master's license, provide (A. 22-22b):[1]

> Applicants for renewal of a master's, mate's, or pilot's license shall present evidence of service on the waters for which licensed, obtained within the 3 years next preceding the date of application, or shall present evidence of employment in a position closely related to the operation of vessels within the same 3-year period.

Petitioner stated on his application for renewal, filed on November 16, 1964, that he had served as a master of the S/S *Theonymphos Tinou* from August 25, 1964, to October 26, 1964, as it navigated through international waters (A. 22). This statement was, as petitioner concedes, false (Pet. 11).[2]

An applicant for a master's license must in addition pass a Coast Guard examination of his knowledge of the International Rules of the Road. An open-book examination, which the applicant virtually cannot fail (Tr. 255), is given those fulfilling the quoted requirement in the application. If the applicant does not fulfill the requirement of past service or related employment, however, he must take a closed-book ex-

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[1] "A" refers to the two-volume Joint Appendix submitted to the court below; "Tr." refers to the transcript of trial proceedings contained in the Appendix, but paginated without the prefix "A". We are lodging a copy of the Joint Appendix with the Clerk of this Court.

[2] Petitioner made no attempt on the application to satisfy the alternate requirement of employment "closely related to the operation of vessels."

amination. A Coast Guard Commander testified that the closed-book examinations "are probably the toughest examinations in the United States" (Tr. 256).

In a letter dated December 16, 1964, Captain Skinitis, marine superintendent for the Tsakalotos Navigation Corporation of which petitioner was president, affirmed that petitioner had served at sea and added that petitioner was also employed as port captain for the company (A. 22c).[3] The letter was filed with the Coast Guard on December 18, 1964, and that same day petitioner took and passed the open-book examination.

At the conclusion of the government's case, counsel for petitioner argued that the concededly false statement of sea service, contained in the application, was immaterial in light of the representation in the Skinitis letter that petitioner was employed as a port captain, a circumstance which, standing alone, would have qualified him to take the open-book examination (Tr. 184-190). The trial judge observed that materiality was not an element of the offense but further determined that under the circumstances the statement of sea service was nevertheless material (Tr. 188-190).

Petitioner contends that the Second Circuit is unique in permitting conviction under 18 U.S.C. 1001

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[3] On rebuttal, the government showed that this letter had been dictated by petitioner himself, who then directed Captain Skinitis to sign it. The witness, petitioner's secretary, added that Skinitis' facility with the English language was extremely poor and that his correspondence was therefore in Greek.

without requiring proof of the materiality of the false statement and that review by this Court is warranted by a conflict among the circuits (Pet. 18-27). The Second Circuit's interpretation of Section 1001 is consistent with the language of the statute, which proscribes the concealment of a material fact or the making of any false statement. As that court observed in a prior case, when it first had occasion to consider the issue of materiality, "it is of doubtful wisdom, not to say potentially dangerous, to import conditions into a penal statute which appear to have been studiously omitted by the lawmakers themselves." *United States* v. *Silver*, 235 F.2d 375, 377, certiorari denied, 352 U.S. 880. However, it is unnecessary to reach this issue in this case since, irrespective of the rule of the Second Circuit, the district judge specifically found that the government had established the materiality of petitioner's false statement, on the ground that the crime was complete upon the filing of the application (Tr. 189-190). Although, as petitioner notes (Pet. 18), the trial judge's finding preceded the presentation of the defense, the evidence presented by the defense was only to the effect that, because of the recitation of his employment set forth in the letter from Captain Skinitis, petitioner would have qualified for the open-book examination without the statement concerning service at sea (Tr. 246-251, 261). This evidence in effect merely repeated the defense argument which had been advanced prior to the trial judge's ruling.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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